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In The Supreme Court of the United States

AMERICAN CHIROPRACTIC ASSOCIATION, INCORPORATED, a non-profit corporation, *et al.*,

Petitioners,

v.

TRIGON HEALTHCARE, INCORPORATED, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE OF FORTY-SIX CHIROPRACTIC PROFESSIONAL ASSOCIATIONS AND THE NATIONAL COMMUNITY PHARMACISTS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The amici chiropractic professional associations represent doctors of chiropractic from all across the nation.[1] Also joining amici is the National Community Pharmacists Associates.[2] These organizations seek to promote, and insure the survival of, chiropractic as a healing profession. The question presented by this case – whether *Copperweld*[3] immunizes the conspiracy between Trigon and medical specialty societies to ensure that patients with musculoskeletal conditions are diverted to medical doctors instead of doctors of chiropractic and to otherwise economically discriminate against doctors of chiropractic by, among other things, implementing annual medical expenditure caps and underpayments – is of the greatest concern to all state chiropractic professional association members, their patient participants in health plans, and, indeed, to all health care consumers in the United States.

SUMMARY OF ARGUMENT

This case involves a conspiracy between Trigon and the Virginia state medical societies and schools to retard, deter and inhibit referrals by medical doctors to chiropractors and represents a concerted effort by medical physicians and Trigon, through punitive and discriminatory insurance reimbursement and referral policies, to drive chiropractors out of the market. *Copperweld* does not

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[1] In letters of consent filed with the Clerk, the parties have consented to the filing of this amici brief. Under this Court's Rule 37.6, amici state that this brief was not authored in whole or in part by counsel for a party and that no one other than amici made a monetary contribution to the preparation or submission of this brief.

[2] The identities of the numerous amici are set forth in the Appendix bound with this brief.

[3] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731 (1984).

immunize Trigon's and the Medical Establishment's conspiratorial anticompetitive conduct. Otherwise, insurance companies, which co-conspire with the Medical Establishment, will continue to discriminate against chiropractic based upon reimbursement and referrals – with this *Copperweld*-protected conspiracy's ultimate goal being the marginalization, and eventual elimination, of the chiropractic profession.

ARGUMENT

I. Medical Physicians And Their Co-Conspirator Insurance Companies Should Not Be Permitted To Use *Copperweld* To Shield Themselves From Antitrust Scrutiny Especially Given The Medical Profession's 40-Year Campaign To Liquidate The Chiropractic Profession.

This Petition must not, indeed cannot, be viewed in a vacuum. This dispute is emblematic of a nationwide conflict between physicians (that is, the Medical Establishment) and competing allied health care participants in sundry health care markets including, but not limited to, chiropractors. For many years, osteopaths, certified registered nurse anesthetists, midwives, and podiatrists, among others, have accused the Medical Establishment of acting anticompetitively by denying them hospital staff privileges and/or excluding their care from reimbursement under insurance coverage. *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984) (exclusion of osteopaths), *cert. denied*, 470 U.S. 1060, 105 S. Ct. 1777 (1985); *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440 (9th Cir. 1988) (exclusion of nurse anesthetists); *Nurse Midwifery Ass'n v. Hibbett*, 918 F.2d 605 (6th Cir. 1990) (exclusion of midwives), *cert. denied*, 502 U.S. 952, 112 S. Ct. 406 (1991); *Cooper v. Forsyth County Hospital Auth., Inc.*, 789 F.2d 278 (4th Cir. 1986) (exclusion of podiatrists), *cert. denied*, 479 U.S. 972, 107 S. Ct. 474 (1986).

The Medical Establishment's anticompetitive animus and exclusionary practices against osteopaths, nurse anesthetists, midwives and podiatrists, however, pale in comparison to its long-running eliminationist trade war against low cost, highly competitive chiropractic providers. The chiropractic profession's current lawsuit against Trigon Blue Cross/Blue Shield (now Anthem) is yet another battle in the chiropractic profession's long struggle for survival against the Medical Establishment's stifling, anticompetitive trade restraints. This beleaguered profession's very survival stands in the balance.

If the Medical Establishment wins this battle, the losers will be not only the chiropractic profession but, even more importantly, the million of consumers of chiropractic care -- care, which has been shown, in study after study, as being more cost-efficient and effective than comparable physician services. Consumers will be the biggest losers.

At issue are palpably anticompetitive insurance reimbursement and referral policies, ones fashioned by anticompetitive physicians, their medical associations and their insurance/reimburser organizations (*e.g.*, Trigon), which are designed and intended to limit reimbursement and referrals to chiropractors for the benefit of medical physicians and to the great harm of health care consumers nationwide.

The Medical Establishment's challenged restraints in Trigon must be viewed in the context of the long, sordid history of restraints imposed by the Medical Establishment and their proxies, whether hospitals or insurance companies, on chiropractors. The Medical Establishment's historical efforts to completely eliminate chiropractic as alternative, competing medical services cannot be ignored. Because physicians, historically, have excluded chiropractors without justification, the Fourth Circuit, in *Ratino v. Medical Service*, 718 F.2d 1260, 1272 (4th Cir. 1983),

directed the district court to consider, among other things, "[t]he history of the restraint." The Fourth Circuit, ironically, gave short shrift to this extensive restraint history in Trigon.

In 1990, the United States Court of Appeals for the Seventh Circuit, in affirming a nationwide injunction against the American Medical Association ("AMA"), characterized the Medical Establishment's national campaign to boycott chiropractic as "lengthy, systematic, successful, and unlawful." *Wilk v. AMA*, 895 F.2d 352, 371 (7th Cir. 1990), *cert. denied*, 496 U.S. 927, 110 S. Ct. 642 (1990).

According to the Wilk district court, the Medical Establishment's purpose for the boycott, which originated in the mid-1960's, was

> to contain and eliminate the chiropractic profession. This conduct constituted a conspiracy among the AMA and its members and an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

Wilk v. American Medical Association, 671 F. Supp. 1465, 1470 (N.D. Ill. 1987), *aff'd*, 895 F.2d 352 (7th Cir. 1990), *cert. denied*, 496 U.S. 927, 110 S. Ct. 2621 (1990). In short, the Medical Establishment was found guilty of attempting to first marginalize and then eliminate an entire profession. Today, the goals – marginalization and eventual elimination – remain the same. Only the methods have changed.

The chiropractic profession's challenge in the 1970's and 1980's was to turn back the "ethics-based," anti-referral boycott against the profession as reflected in Wilk:

> In 1967, the AMA Judicial Council issued an opinion under Principle No. 3 specifically holding that it was unethical for a physician to associate professionally with chiropractors

> . . . . Associating professionally would include making referrals of patients to chiropractors . . . . This opinion . . . was widely circulated to members of the AMA . . . . The opinion on chiropractic was also sent by the AMA to 56 medical specialty boards and associations.

Id. at 1473-74 (internal punctuation and record citations omitted).

The end result of this professional ethics anti-referral boycott of chiropractic was the following:

> Through such mechanisms, individual physicians were discouraged from cooperating with chiropractors in patient treatment, because referrals were inhibited by defendants' activities; . . . referrals from medical doctors were reduced. The product demand for chiropractor services was negatively effected.

Id. at 1479. Trigon, by its anticompetitive reimbursement and referral practices, also seeks, in conspiracy with the Medical Establishment, to reduce to zero "product demand for chiropractic services."

The Medical Establishment's now discredited ethics-based boycott was a failed attempt to steer as many patients as possible away from chiropractors. The Medical Establishment has the same anticompetitive goal, today. The only difference is that insurance reimbursers like Trigon have replaced AMA "ethical" rules as the Medical Establishment's preferred vehicle for liquidating this profession.

As the anti-referral "ethics" prescriptions found to violate the antitrust laws in Wilk were intended to

marginalize and eliminate the chiropractic profession, the "reimbursement and referral" policies adopted by Blue Cross/Blue Shield plans (including, but not limited to, Trigon) are designed to limit and contain the growth of chiropractic reimbursement in the face of growing public recognition and acceptance of comparably more effective, low cost chiropractic treatment for common conditions such as back pain. If chiropractic's challenge in the 1970's and 1980's was to thwart the Medical Establishment's ethics boycott against the profession, the challenge, today, is to rebuff the Medical Establishment's insurance-based "coverage" and ""reimbursement" boycott while hiding behind *Copperweld*. *Copperweld* immunity, however, should not be used as a license to destroy a profession.

Blue Cross/Blue Shield has long been considered the Medical Establishment's insurance company, to the exclusion of chiropractors and other non-medical physicians. *See, e.g., Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 485 (4th Cir. 1980) (Trigon's predecessor refused to reimburse for clinical psychologists' services unless billed through a physician), *cert. denied*, 450 U.S. 916, 101 S. Ct. 1360 (1981); App. 75a-84a. The growing evidence of low cost chiropractic clinical superiority and the establishment of higher relative values for chiropractic manipulation, however, economically threatened continued medical physician reimbursement dominance under these physician-friendly plans.

Anti-competitive, anti-chiropractic referral and reimbursement policies were soon adopted, by many health care plans, that treated chiropractic physicians as second-class providers in terms of referrals and reimbursement. It was again "open season" on chiropractors and, by extension, their patients.

The discriminatory reimbursement and referral policies adopted by Trigon Blue Cross/Blue Shield of

Virginia and the Medical Establishment, were particularly harsh, repressive and anti-competitive:

- Paying chiropractors forty (40%) percent less than medical doctors for the same services;
- Failing to pay for all services rendered;
- Applying an arbitrary $500 cap on manipulation services provided by chiropractors; and
- Failing to pay for the services rendered by a chiropractic assistant while paying for the equivalent services rendered by a medical assistant.

App. 1105a-1153a.

This stark economic discrimination shares similarities with anti-chiropractic policies adopted by Blue Cross/Blue Shield plans in other states. These discriminatory policies, written and drafted with the cooperation of medical competitors, sought to limit chiropractic reimbursement in a way no other provider's reimbursement is limited. Whether the issue is percentage limitation or caps on reimbursement or in failing to pay for the services rendered by a chiropractic assistant, these disparate reimbursement schemes have all been crafted by physician-friendly Blue Cross/Blue Shield plans and other insurance companies as a means by which chiropractors and chiropractic services may be limited, contained and, in time, eliminated -- all for the Medical Establishment's anticompetitive benefit.

As the anti-referral "ethics" prescriptions found to violate the antitrust laws in Wilk were intended to marginalize and eliminate the chiropractic profession, the discriminatory "economic" referral and reimbursement policies adopted by Blue Cross/Blue Shield plans in the

1990's were intended to marginalize and eliminate the chiropractic profession in light of growing pubic recognition and acceptance of chiropractic treatment. The restraint has simply mutated over time.

Consumer welfare is the Sherman Act's touchstone. This Court, in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S. Ct. 982 (1940), well-stated the consumer welfare goal of the antitrust laws:

> The end sought [by the Sherman Act's prohibition against unreasonable restraint of trade] was the prevention of restraint to free competition in business and commercial transaction which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Id. at 493 (emphasis added).

The central purpose of the antitrust laws is to preserve competition and, by extension, advance consumer welfare. It is competition that is vital to the public interest and every precedent in the antitrust field recognizes that the untrammeled interaction of competitive forces is what will, in the end, benefit consumers. The Fourth Circuit, in its cursory treatment of *Copperweld*, ignored not only the history of the restraint, as exemplified by the Medical Establishment's 40-year effort to eliminate chiropractic competition but also ignored the extremely harmful impact its *Copperweld*-based decision would have on consumer welfare. At least for those states in the Fourth Circuit, the Trigon Decision immunizes insurance companies as they, in doing the Medical Establishment's bidding, economically

discriminate against chiropractic in reimbursement and referral practices.

Consumer welfare, in the antitrust context, recognizes that consumers should be able to choose their preferred products or services, rather than have their choices made by well-entrenched, dominant providers. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459, 106 S. Ct. 2009 (1986). This Court, for example, in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S. Ct. 1355 (1978), rejected a defendant professional association's attempt to justify its ban on competitive bidding by asserting that consumers would be unable to distinguish between good and bad architects if architects were allowed to compete on price. *Id.* at 693-95.

It is consumers, not competitors, who possess the right to decide who competes with whom. If this Court denies this Petition, however, cost effective, high quality chiropractic services will be effectively denied to millions of people who reside in the Fourth Circuit. The loser would be not only the chiropractic profession but, more importantly, consumers of clinically proven chiropractic services. The Medical Establishment's long-held goal to marginalize and eliminate chiropractic as an will have been, in large part, realized.

Trigon, through its physician-dominated reimbursement and referral policies, is functionally excluding, through starkly discriminatory reimbursement and referral policies, a targeted class of competitors. The end result of this structural conspiracy is that many consumers are deprived of the much needed services of chiropractic doctors. Subscribers of Trigon and of other plans (who substantially limit chiropractic reimbursement and referrals), and who would prefer the services of a chiropractor find themselves effectively denied these essential services. These frustrated consumers' only

alternative is to go outside the plan and pay an out-of-pocket premium for chiropractic services, which results in higher overall prices.

Trigon's fundamental disregard of consumer welfare was underscored in the testimony of Trigon's Chief Medical Officer, William Bracciodieta, M.D. Dr. Bracciodieta, when asked whether Trigon evaluated the effects on its insureds "of its insurance coverages or lack of coverages on the healthcare provided," responded: "No. Again, that's not the business that we're in." (Petitioners' Fourth Circuit Brief at 37).

Trigon's denial of consumer chiropractic choice is particularly egregious in light of the health care industry's well-established recognition of chiropractic care's effectiveness. In 1994, for example, the Agency for Health Care Policy and Research ("AHCPR") of the U.S. Department of Health and Human Resources issued a 170-page study entitled "Acute Low Back Pain in Adults," along with an accompanying 30-page "Quick Reference Guide for Clinicians", entitled "Acute Low Back Problems in Adults: Assessment and Treatment." App. 798a-1040a, 1041a-1071a.

The AHCPR Study was conducted by a multidisciplinary panel comprised of twelve (12) medical physician experts, and other healthcare professionals and consumer representatives, who were brought together by the Agency for Health Care Policy and Research to perform an evidence-based analysis of all research trials and treatment approaches to acute low back pain in adults. Abstracts of over 10,000 research papers were reviewed, and almost 4,000 articles were retrieved. App. 798a-809a, 819a-822a.

The AHCPR study took nearly two years to complete. The findings and recommendations were given and included in Table 2 of the Quick Reference Guide of

Clinicians. Recommendations were for acetaminophen and, among other things, "manipulation." App. 802a-804a, 1041a-1071a.

Significantly, the AHCPR Study specifically identified and defined the recommended spinal manipulation as the type of manipulation used by all chiropractors:

> Spinal manipulation includes many different techniques. For this guideline, manipulation is defined as manual therapy in which loads are applied to the spine using short and long lever methods. The selective joint is moved to its end range of voluntary motion, followed by application of an impulse loading. The therapeutic objectives of manipulation include symptomatic relief and functional improvement.

App. 859a. This "functional improvement" is what gets patients back to work faster and at less expense. The Rand Corporation, in a separate study, concluded that chiropractors offered 90% of the recommended manipulation services in the United States. App. 156a, 158a, 211a.

Despite the AHCPR Study's endorsement of chiropractic, Trigon and the Medical Establishment in a concerted effort to prevent referrals from medical doctors to chiropractors, published the Trigon Guidelines, which obfuscated and obliterated the AHCPR-endorsed chiropractor-provided manipulative therapy. App. 1122a-1125a.

Trigon's contention that it had no economic motivation to harm chiropractors or to steer patients to medical doctors and away from chiropractors is rubbish.

Trigon's largest cost category is payment to healthcare providers. Trigon elected to pay chiropractors forty (40%) percent less than medical doctors for the identical service despite the chiropractors' superior skills in these areas as recognized, among other things, by the 1994 AHCRP Study. App. 1128a.

If Trigon was motivated only by economic concerns, it would not pay medical doctors more to provide inferior care than it pays chiropractors to provide superior care. That Trigon pays medical doctors more demonstrates that Trigon is not making an independent economic judgment. It is, rather, making a collusive judgment in combination with medical doctors – one that poses harm to patients and losses to chiropractors, all for the gain of medical doctors.

In light of the Medical Establishment's long, eliminationist trade war against chiropractors, this Court should not allow the Medical Establishment, through its insurance vehicle, Trigon, to finish what the AMA started 30-years ago: the marginalization and eventual elimination of the chiropractic profession.

If this Petition is denied and the Medical Establishment is permitted to conspire with insurance companies shielded behind *Cooperweld*, the Medical Establishment will, through this "reimbursement and referral" conspiracy, economically discriminate against, marginalize and ultimately eliminate chiropractors. The Medical Establishment would then be free to provide inferior care at higher cost without fear from rivals. Consumers, the ultimate losers, will be effectively denied reimbursed low cost, high quality chiropractic care.

The Medical Establishment's long sought goal – the liquidation of the chiropractic profession – will be one step closer to realization.

II. Trigon's $500 Cap, Along With Its Refusal To Pay For Increased Services, Has The Potential To Reduce Inputs Without Any Corresponding Consumer Benefit

Trigon's policies regarding chiropractors have the potential to create devastating anti-consumer effects in the Virginia market. In this regard, Trigon has instituted a policy that caps payment for chiropractic services at $500.00 per year. A cap on the amount of services will, in reality, only deter the provision of beneficial services to consumers. While it is not atypical for Managed Care Organizations such as Trigon to make efforts to reduce costs, such reductions, combined with the fact that Trigon is certainly one of the largest payors in Virginia, have a monopsonistic effect on the input market for acute back-pain services. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 68 S. Ct. 996 (1948) (price fixing in input market for sugar beets).

In addition, Trigon's cap does not exist in a vacuum. Rather, in this case, the policies must be considered along with Trigon's refusal to pay for chiropractic services based upon the complexity of the services performed, thereby engaging in price discrimination with regard to chiropractic services. Trigon will compensate physicians based upon the complexity of the services, but refuses to do the same for chiropractors. While Trigon attempts to legitimize this policy based upon the amount of training and expense incurred by allopaths and other practitioners, the fact is that in a competitive market, price is determined by the amounts consumers are willing to pay. A capitalistic economy does not, and cannot, purport to weigh or judge the perceived merits of goods or services purchased by consumers. That the services may be outside of what Trigon views as the traditional paradigm should not drive the competitiveness of the pricing. If medicine were reduced to the traditional paradigm, innovation would not occur.

In essence, this is exactly what Trigon is doing in this case. Despite the fact that numerous independent studies have demonstrated that a percentage of consumers prefer to receive services from chiropractors, it has instead sought to discriminate against these services because chiropractors are perceived as receiving a less expensive education. Trigon has, in essence, substituted its judgment for the judgment of consumers. Thus, Trigon's preemptive judgment has limited consumer choice.

The concern is that these policies can easily be applied to other forms of treatment involving other practitioners and any new form of treatment.

In fact, much of the philosophy of managed care is to avoid new or different treatment options. This type of behavior, when engaged in by an MCO in a purely competitive market, can be easily disciplined by consumer choice. Here, however, because Trigon is alleged to be a dominant player in this market, consumers have less of an opportunity to switch health insurers. App. 79a. The consumer realities of these types of choices were not appropriately considered by the District Court or the Fourth Circuit Court of Appeals in this matter. Unfortunately, a jury was not permitted, as it should have been, to address these issues which are critical to all health care providers.

Dr. Leonard G. Schifrin, Chancellor Professor of Economics, Emeritus, of the College of William & Mary, in his report, discussed the potential output-reducing ramifications of the caps:

> Reimbursement caps or limitations, if set at restrictive levels, can impose heavy financial penalties on patients and also on chiropractors. Trigon has imposed a cap on payments for spinal manipulation of $500 per year per insured individual. In other words,

> Trigon will pay a total of no more than $500 to any and all chiropractors for therapy for a Trigon-covered individual in a given year regardless of how much treatment is necessary to remedy the problems suffered by that person. . . . Obviously, this will curtail the demand for chiropractic services, redirecting patients to other types of providers such as medical doctors at the outset or during their chiropractic treatment, or perhaps causing patients to halt their therapy entirely when the $500 limit is reached.

App. 1119a.

Antitrust jurisprudence has largely ignored the effects a dominant buyer can have on the input market. In large respect, this is due to notions in the case law that an insurer, such as Trigon, is merely an agent acting on behalf of the insured. *See Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922, 925 (1st Cir. 1984). In fact, this view appears to dominate antitrust thinking with regard to dominant buyers in the health care setting. That is, they are acting on behalf of their members. This notion is outdated.

While the concept that a health insurer acts as an agent for its insured may have been valid twenty years ago when now-Justice Breyer authored *Kartell*, current payor/relations have changed such that insurers, especially managed care organizations, cannot be viewed as agents of insureds. Indeed, in the ensuing twenty years, the industry has witnessed a remarkable increase in the number of "patient rights" laws designed to provide managed care members with access to care.[4] Thus, in today's

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[4] *See, e.g.*, 40 Pa. Stat. §§ 991.2101 *et seq.* (typical of Acts passed to protect patients).

environment, insurers, such as Trigon, have every incentive to reduce the care provided to members. Accordingly, the paradigm once thought applicable to health care financing organizations is no longer valid.

Professors Hammer and Sage identified this issue and the problems it creates in today's environment, in a recent article:

> Because the case involves insurance benefits rather than more typical goods or services, [Justice] Breyer never sees Blue Shield as buying inputs from suppliers in order to create and sell a final product to consumers. Two decades of hindsight with respect to the evolution of the health insurance industry reveal this to be a staggering omission. Managed care is all about integrating the financing and delivery of health care services into a single product. Moreover, market structure and competition have direct implications for the fidelity of [the court's] principal-agent relationship between insurer and insured. The exercise of monopsony power can be a form of agency failure, particularly if it contributes to higher prices or reduced output in the final product market. The monopsonist maximizes its own surplus, not the surplus or utility of its customers.

P.J. Hammer & W. Sage, *Monopsony as an Agency and Regulatory Problem in Health Care*, 71 Antitrust L.J. 949, 962 (2004). *See also* R.D. Blair and J.B. Herndon, *Physician Cooperative Bargaining Ventures: An Economic Analysis*, 71 Antitrust L.J. 989, 998 (2004) (to maximize profit, a monopsonist will effectively buy a smaller quantity of

inputs and pay less for those inputs, thereby benefitting MCO's to the detriment of consumer welfare).

Where savings are passed on to consumers as a result of lower prices, naturally, the monopsony problem does create significant consumer welfare issues. In cases of a profit maximizing insurer such as Trigon, however, there is no incentive to pass these savings on to consumers. Arguably, the cap in this case has the exact opposite effect and may actually drive prices to consumers up instead of down.

For example, the cap prevents patients from obtaining services from chiropractors in excess of $500. Unless the patient is willing and financially able to pay for such services on his or her own, the patient must face a difficult choice: forgo treatment altogether or obtain less efficient treatment from a higher cost provider. Because the caps do not apply to other health care practitioners, the result can only be that the patient will obtain higher cost services from other providers. While a profit maximizing insurer would have no motive to pass on cost savings to consumers, it would have every incentive to pass on the additional costs to consumers, whether directly to the members through higher co-payments or through higher premiums to employers.

The end result is that dominant insurers profit from the lower prices while patients and suppliers suffer. At a minimum, this case presents important issues regarding health care financing and provider relations that have serious consequences for patients who are the ultimate end-users of the health care system.

In fact, the Guidelines promulgated by Trigon appear to recommend that no treatment be provided in the first month of onset of acute low back problems:

> Ninety percent of patients with acute low back problems, as defined here, spontaneously recover activity tolerance within one month. The approach to a new episode in a patient with a recurrent low back problem is similar to that of a new acute episode.

App. 1094a-v. According to the RAND study, however, most patients receive an average of 5 to 18 visits to a chiropractor per episode. App. 166a. Additionally, in reviewing the literature from the Ohio State Chiropractic Association, the RAND study indicates that treatment for mild to moderate back pain should optimally occur daily to three times per week for approximately thirty days. App. 187a. Trigon's policy acts as an input reduction mechanism.

Even if the caps were not sufficient to warrant a re-examination of this case, the policy of refusing to pay a higher rate for more complex services boarders on predation. For example, Trigon's policy is to reimburse chiropractic manipulation services at one rate regardless of whether the chiropractor manipulated one region, or five regions.

There is no dispute that extra work may be required to manipulate more than one region. In fact, based upon the record, Trigon routinely reimburses additional amounts to other providers based upon the complexity and number of the procedures. The reality is that Trigon is receiving services for free. Arguably, this could be viewed by a fact-finder as evidence of predatory conduct.

The Third Amended Complaint alleges:

> Ignoring incremental RBRVS values representing the difference between treatment of the minimum number of regions of the spine and treating a greater number of regions cannot fairly or reasonably be characterized as being guided by RBRVS values or based on RBRVS methodologies. It is completely ignoring the values and methodologies.

App. 102a, ¶ 167.

There is no evidence that any savings will be passed on to consumers. As such, although the lower courts did not allow the case to go to trial, the case here has the classic signs of potential monopsony effects:

> It is tempting to infer that the lower reimbursement rate will be passed on to the patients in the form of rebates or lower insurance premiums, but this is not the case for a profit-maximizing monopsonist. The effect of monopsony power is to raise the marginal cost curve while lowering the average cost curve. n36 The former will lead to an increase in premiums if the health plan has market power in the insurance market and no change in premiums if it does not. It will not lead to a reduction in premiums because there is no economic incentive to reduce premiums, i.e., reducing premiums will not increase the insurer's profits. It is true that average cost is now lower and, therefore, the insurer could afford to lower premiums. But it would not be profit maximizing to pass on the cost savings to the policy holders. The

> reduction in average cost is what leads to an increase in profits, which provides the incentive to restrict purchases in the first place.

Blair & Herndon, 71 Antitrust L.J. at 1000.

Because of the current health care financing environment, it is important for this court to review practices which may have the effect of reducing output in the provider markets. Such reductions can have profound effects on consumers.

CONCLUSION

For the foregoing reasons, Amici submit that ACA's Petition should be granted and the decision of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted

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